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IN THE

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law requires registered interstate motor carriers to file with the Department of Transportation a proof of insurance "sufficient to pay . . . for each final judgment against the registrant." 49 U.S.C. § 13906(a)(1). Under the applicable federal regulations, insurance policies filed to satisfy this requirement incorporate, or are deemed to incorporate, the "Form MCS-90" endorsement. Promulgated by regulation, this Form provides, in relevant part, that an insurer who issues a policy to a registered motor carrier will pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . ." *See* 49 C.F.R. § 387.15.

This regulatory framework requires the issuing insurer to pay any such judgment even if the vehicle involved in the loss was not covered by the base policy, and even if any other exclusions, deductibles, or limiting language would otherwise preclude coverage under that policy. At the same time, the Form MCS-90 makes clear that this obligation differs in kind from standard insurance coverage because it requires the insured to reimburse the insurer for such payments.

The question presented in this petition is:

Whether the Form MCS-90 endorsement attached to an insurance policy issued to a motor carrier requires the issuing insurer to pay a judgment entered against parties (in this case a different motor carrier and its driver) that are not entitled to coverage under the base policy, even where there is no "final judgment . . . against the insured" motor carrier named in the insurer's policy.

CORPORATE DISCLOSURE STATEMENT

Petitioner John Deere Insurance Company is a wholly owned subsidiary of Sentry Insurance Company, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Deere Insurance Company ("John Deere"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 229 F.3d 853 (9th Cir. 2000), and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The opinion of the United States District Court for the Central District of California (Baird, J.) is unreported and is reprinted at App. 16a.

JURISDICTION

The opinion of the Court of Appeals was issued on September 20, 2000. At timely petition for rehearing and rehearing *en banc* was denied on December 26, 2000. App. 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §§ 13901-13908. Pertinent provisions are reprinted at App. 36a. The regulations promulgated thereunder are published at 49 C.F.R. § 387.1-.419. Pertinent provisions are reprinted at App. 38a. The MCS-90 Endorsement, set forth at 49 C.F.R. § 387.15, is reprinted at App. 39a.

STATEMENT OF THE CASE

The ICC Termination Act of 1995 (the "Act") requires all registered motor carriers to file a bond, insurance policy, or other security "sufficient to pay . . . for each final judgment against the registrant." 49 U.S.C. § 13906(a)(1). The Act directs the Secretary of Transportation to "prescribe the appropriate form of endorsement to be appended to policies of insurance" to subject such policies to "the full security limits of the coverage required." *Id.* § 13906(f). The Secretary has promulgated regulations requiring motor carriers to file "certificates of insurance . . . conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person." 49 C.F.R. § 387.301(a)(1). The Secretary has also prescribed the required endorsement, known as a "Form MCS-90 endorsement" ("MCS-90"), in which a motor carrier's insurer agrees to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles." 49 C.F.R. § 387.15. With few exceptions, the MCS-90 requires the insurer to pay all judgments entered against the insured, even if the base policy does not apply, for whatever reason.

After determining that an insurance policy issued by Petitioner to a motor carrier did not cover an accident in which Respondents sustained injuries, the district court held that the MCS-90 attached to the policy does not require Petitioner to pay a judgment entered against any party other than the insured motor carrier. The Ninth Circuit reversed, holding that the MCS-90 modifies a policy to which it applies, thereby requiring the insurer to pay judgments entered against parties who are not covered by the policy, even in the absence of a judgment against the insured motor carrier. As set forth more fully below, this Court should grant review because the Ninth Circuit's opinion ignores the plain language of the MCS-90 and the statutes and regulations that it implements,

conflicts with the majority of the decisions that have addressed the effect of the MCS-90, and exposes insurers and motor carries to liability for judgments that they have no right to contest. According to industry estimates, approximately 150,000 new MCS-90 endorsements are issued each year, thereby exposing insurers to liability for losses arising out of some 2 million combination units and nearly 6 million trucks. Accidents involving vehicles covered by the MCS-90 are very common. In 1999 alone, the Department of Transportation received reports of some 421,000 accidents involving such vehicles. As a result, the Ninth Circuit's erroneous ruling and the perverse incentives that it creates will have a significant impact on motor carriers and insurers around the country. In light of its wide-ranging and deleterious impact, and the substantial uncertainty that it has created, the decision below requires this Court's prompt review.

A. Regulatory Background.

As noted above, federal law prohibits any regulated motor carrier from engaging in foreign or interstate commerce unless it has filed a certificate of insurance or other proof of insurance "conditioned to pay any final judgment recovered against such carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation . . . ." 49 C.F.R. § 387.301(a)(1). Applicable law and regulations provide that motor carriers may be held vicariously liable for the negligence of their employees and parties who use their vehicles with permission. *See, e.g., Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (2d Cir. 1991) ("The language of both the statute and the implementing endorsement thus reflect an intention to furnish indemnification even where the insured carrier is adjudged only vicariously liable for the negligence of another.").

Under the federal regulatory scheme, a motor carrier that leases a vehicle must accept complete responsibility for the

operation of that vehicle. *See* 49 U.S.C. § 14102(a)(4) (authorizing Secretary of Transportation to require motor carriers who lease vehicles to "have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary"); 49 C.F.R. § 376.12(c)(1) (a lease between an authorized motor carrier and the owner of a vehicle "shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease"). And under the laws of many states, motor carriers who operate their own vehicles, or who lease vehicles to other motor carriers, are subject to strict or vicarious liability for accidents resulting from the operation of those vehicles.[1]

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[1] *See, e.g.*, Cal. Veh. Code § 17150 (West 2000) ("Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."); Conn. Gen. Stat. Ann. § 14-154a (West 2000) ("Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if he had also been the owner."); Neb. Rev. Stat. § 25-21,239 (2000) ("The owner of any truck, truck-tractor, whether with or without trailer, or trailer, leased for a period of less than thirty days or leased for any period of time and used for commercial purposes, shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state"); N.Y. Veh. & Traf. Law § 388(1) (McKinney 2000) ("Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.").

In short, under federal and state law, motor carriers face exposure to judgments arising from the negligence of employees and other parties to whom they have entrusted vehicles that they own or hire. To guard against such judgments, and to satisfy the regulatory requirements described above, motor carriers purchase insurance policies, which require insurers to defend and indemnify covered parties for certain accidents. These policies typically include provisions that limit coverage to particular parties or vehicles, or require the satisfaction of certain conditions. For example, policies often provide that the insurer has no duty to defend or indemnify if the motor carrier does not provide timely notice of an accident, or if an accident involves particular employees or vehicles that are not listed in the policy. Other policies contain deductibles or self-insurance provisions, which oblige insurers to pay only judgments above specified dollar amounts. Given such exclusions, and the broad liability contemplated by applicable federal and state laws, standard insurance policies sometimes do not cover judgments against insured motor carriers. Thus, standing alone, these policies do not guarantee that injured members of the public will be able to recover from motor carriers liable for their injuries. And disputes between insurers and their insured motor carriers may delay the payment of judgments.

The MCS-90 protects injured members of the public by ensuring prompt payment of judgment entered against regulated motor carriers. It does so by making clear that any limitations or exclusions in the base insurance policy are ineffective against members of the public. Thus, an insurer that has issued a policy to a motor carrier must pay, up to a limit fixed by regulation (now $750,000, in most cases), "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of [regulated] motor vehicles" 49 C.F.R. § 387.15, even if the terms of the policy would not require the payment. Under the MCS-90, an injured member of the pub-

lic may bring an action against an insurer to recover such a judgment.

But the MCS-90 does not create a windfall for the insured motor carrier. Although it requires the insurer to pay an injured member of the public in circumstances not covered by the motor carrier's insurance policy, the MCS-90 does not affect the terms of the agreement between the insurer and the insured motor carrier. That is because the MCS-90 requires the insured to reimburse the insurer for "any payment that the [insurer] would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." 49 C.F.R. § 387.15. At the end of the day, the MCS-90 leaves all terms, conditions, and limitations in the underlying policy in full force and effect between the insured and the insurer. Although the insurer bears initial responsibility for payment of judgments entered against the insured for matters that fall outside the policy, the MCS-90's reimbursement provision makes clear that the insured must ultimately bear the cost of such judgments.

In short, if a defendant is an "insured" entitled to coverage under the terms of a policy, the MCS-90 does not come into play. The insurer must simply defend and indemnify that party, and assume all the costs of doing so. The MCS-90 has a role only when an injured member of the public sues an insured motor carrier for injuries excluded from coverage under the terms of the base policy. In this event, the MCS-90 does not require the insurer to provide a defense or give it any right to notice of or control over the underlying litigation.[2] Rather, the MCS-90 simply requires the insurer

[2] As a practical matter, a motor carrier has ample incentive to inform its insurer when it faces such litigation, and will typically allow its insurer to participate in its defense, if the insurer wishes to do so. As discussed below, however, a driver facing such a lawsuit does not have the same incentive.

to pay a final judgment obtained in such an action, thereby ensuring that the claimant will obtain prompt compensation. But because the insurer is entitled to reimbursement from the insured, the MCS-90 does not shift the ultimate liability from the motor carrier to its insurer.

B. Factual Background.

The underlying facts are not in dispute. On November 24, 1995, a tractor/semi-trailer rig driven by Gurmukh Singh Garcha and operated by Blue Star Transportation ("Blue Star") collided with a bus owned by Respondent Los Angeles County Metropolitan Transit Authority ("LACMTA") and driven by Respondent Guillermo Nueva ("Nueva"). App. 19a. In this accident, Nueva suffered personal injuries and the bus sustained damage that rendered it a total loss. App. 3a. The tractor portion of the rig belonged to Inderjit Singh and Garcha, dba Blue Star. App. 19a. When the accident occurred, Baljit Singh Sahota, dba Sahota Trucking, owned the trailer and had agreed to sell it to Blue Star, but had not yet received payment or transferred title. App. 3a.

Prior to the accident, Sahota had purchased an insurance policy (the "Policy") from Petitioner John Deere. App. 4a. The Policy, which was in force at the time of the accident, required John Deere to pay all sums that an "insured" is legally obliged to pay for bodily injury or property damage caused by an accident resulting from the use of a covered vehicle. *Id.* In pertinent part, the Policy offers the following definition of "WHO IS AN INSURED":

> (a) You for any covered auto;
>
> (b) Anyone else while using with your permission a covered "auto" you own, hire, or borrow . . . ." App.5a.

The Policy provides that "covered autos" are "[o]nly those 'autos' described in ITEM THREE of the Declarations

for which a premium charge is shown . . . ." *Id.* Item Three of the Policy did not describe the semi-trailer involved in the accident. *Id.* Nor did it describe the attached tractor. Accordingly, as the district court and the Ninth Circuit both found, Garcha and Blue Star did not qualify as "insureds" under the Policy. Attached to the Policy was an MCS-90 Endorsement, whose pertinent portions are set forth in the appendix. *Id.*

On November 13, 1996, Nueva filed a personal injury action against Garcha, Blue Star, Sahota, Sahota Trucking, and others in the Los Angeles County Superior Court. App. 20a. On December 18, 1996, the LACMTA brought an action against the same defendants, seeking reimbursement of the property damages to the bus and workers' compensation payments to Nueva. *Id.* In that case, the LACMTA has filed defaults against Blue Star, Singh, and Garcha. *Id.*

C. District Court Proceedings.

On January 5, 1998, John Deere filed this action against several parties, including LACMTA and Garcha, seeking a declaratory judgment that it had no duty under the Policy to indemnify Garcha, Blue Star, and Sahota, among others, with respect to any liability arising from Nueva's personal injury action. App. 17a. In March 1998, LACMTA filed an answer and a cross-claim for declaratory relief. App. 17a-18a. LACMTA sought a declaration that, under the Policy, as amended by the MCS-90 endorsement, Garcha and Blue Star are "insureds" and that John Deere must therefore pay any judgment against Sahota, Garcha, and Blue Star, up to the Policy's $750,000 limit. App. 18a.

Upon cross-motions for summary judgment, the district court granted John Deere's motion for summary judgment, denied LACMTA and Nueva's motion for summary judgment, and dismissed Sahota and Sahota Trucking for lack of prosecution. App. 33a. The district court held that the Pol-

icy did not cover the operators of the tractor/trailer as "insureds" and that the MCS-90 did not alter the policy in any relevant respect. App. 29a. The court acknowledged that the MCS-90 establishes a "reimbursable obligation" requiring John Deere to make certain payments on behalf of its named insured, Sahota, that the Policy would not otherwise mandate. *Id.* However, the court held that the MCS-90 did not create "coverage" for Garcha and Blue Star, who, as users of non-scheduled vehicles, had no independent protection under the Policy. *Id.*

The district court relied on the Ninth Circuit's prior decision in *Harco Nat'l Ins. Co., v. Bobac Trucking, Inc.*, 107 F.3d 733 (9th Cir. 1997). The court read *Harco* as distinguishing between the "coverage" provided by an insurance policy and a separate "reimbursable obligation" imposed by an MCS-90. App. 27a. As Garcha and Blue Star were not named insureds and drove a non-covered auto, the court concluded that John Deere owed no duty to indemnify them: "The MCS-90 . . . [does] not vary the terms of the policy so as to create 'coverage' where it did not formerly exist; [it] impose[s] only a reimbursable obligation as to final judgments rendered against the named insured." App. 32a.

D. The Ninth Circuit's Decision.

The Ninth Circuit reversed. App. 15a. The court began by examining the terms of the Policy, and agreed with the district court that Sahota's trailer was not a "covered auto." App. 5a. As a result, the court found that, as "permissive users of a non-covered auto," Garcha and Blue Star "are not 'insureds' per the underlying policy's express terms." *Id.* The court then turned to the question that requires this Court's review: Whether, in the absence of a judgment against the insured motor carrier, the MCS-90 endorsement changes the terms of the Policy and requires John Deere to indemnify parties not included in its coverage.

The court answered that question in the affirmative. The court began by rejecting the district court's reliance on *Harco*. The court distinguished *Harco* in three ways. First, it noted that *Harco* simply held that the MCS-90 does not create a duty to defend, and that this ruling is irrelevant to the question whether the MCS-90 imposes a duty to indemnify. App. 9a. Second, the court said that the MCS-90 does not speak directly to the duty at issue in *Harco*, but that it does explicitly require an insurer to "indemnify its insured for non-covered autos." *Id.* Third, the court pointed out that *Harco* involved a dispute between an insured and its insurer, rather than a claim by an injured member of the public against an insured. *Id.* As a result, the court felt that the "policy considerations inherent in this dispute" did not play a role in *Harco*. App. 10a.

Finding its own precedent unpersuasive in this context, the court instead relied upon *Adams v. Royal Indem. Co.*, 99 F. 3d 964, 968 (10th Cir. 1996), a case it perceived as having "nearly identical facts." App. 11a. The court agreed with the Tenth Circuit's conclusion that the MCS-90 "indirectly modifie[s]" the insurance policy's definition of "insured" by expanding that term to include permissive users of any vehicle owned, hired, or borrowed by the insured, regardless whether the vehicle is a "covered auto" under the policy. App. 12a.

In reaching this conclusion, the court focused on the following "critical language" from the MCS-90: "[T]he insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy* . . . ." App. 13a (emphasis in original). The court regarded the italicized language as indicating that if a policy limits its protection to "covered" or "specified" autos, this limitation "ceases to operate when an injured member of the public seeks indemnification on behalf of the 'insured.'" *Id.*

Petitioner argued that the preceding language, requiring payment of "any final judgment rendered against the insured," referred only to the insured motor carrier named in the Policy. App. 13a. Thus, petitioner claimed that its obligation to make payments under the MCS-90 is triggered only by the entry of judgment against Sahota. The Ninth Circuit rejected this argument. App. 14a. Instead of confronting the language and structure of the MCS-90 and the underlying statute and regulations, the court reached its conclusion by constructing a syllogism.

Beginning with the uncontested proposition that the MCS-90 would require John Deere to pay a judgment entered against Sahota – its named insured motor carrier – if he were involved in accident while driving a non-covered auto, the court assumed that this obligation would arise because the MCS-90 modifies the Policy's definition of an "insured" from "You for any covered auto" to "You for any auto." The court saw no reason to hold that MCS-90 has a different effect on the Policy's two definitions of "Who is an Insured." *Id.* Having reached that point, the court felt that it would be anomalous for the MCS-90 to modify the definition of "insured" with respect to the named insured, yet not its permissive users. *Id.*

Finally, the court invoked public policy considerations to support its ruling. The court pointed out that its interpretation of the MCS-90 carries out the statutory goal of ensuring that an insurer is available to pay judgments against motor carriers for damages to injured members of the public. *Id.*

Having concluded that the MCS-90 modified the Policy by making Garcha and Blue Star "insureds," the court held that, even without a judgment against its named insured, John Deere is liable to Respondents for a judgment against Garcha and Blue Star, up to the Policy maximum. App. 15a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision raises an important question about the effect of a federally mandated endorsement that is attached to millions of vehicles in circulation around the country. In holding that an insurer of a certified motor carrier may be liable under the MCS-90 without the entry of a judgment against it, the Ninth Circuit has ignored the plain language of the MCS-90 and the text and regulations that it is designed to implement. By joining the Tenth Circuit in this erroneous interpretation, the Ninth Circuit has exacerbated an existing conflict of authority.

The Ninth Circuit's approach stands in direct conflict or considerable tension with longstanding rulings of the Third, Fifth, Eighth, and D.C. Circuits. These courts have all made clear that, although the MCS-90 requires insurers of motor carriers to make reimbursable payments to satisfy judgments against those motor carriers, it does not change the policy definition of "an insured" or impose such liability without a judgment against the motor carrier named in its policy.

The Ninth Circuit's departure from this sensible rule creates an inequitable situation for both insurers and motor carriers. Under the Ninth Circuit's approach, an insurer must pay judgments against permissive users of vehicles of its insured motor carrier, but has no right to participate in the defense of the underlying actions against those users. In a typical insurance claim, the insured party is entitled to coverage only if it notifies the insurer promptly of the claim and allows it to control any litigation. But the Ninth Circuit's approach gives insurers no such right and creates a perverse incentive for drivers to accept settlements or default judgments. Insurers must pay these obligations, and their insured motor carriers must reimburse them, but neither the motor carriers nor the insurers have any right to contest the underlying liability or the amount of the damages. And because

the MCS-90 requires them to reimburse their insurers for such payments, motor carriers may be saddled with judgments that they had no opportunity to contest. The Ninth Circuit rule thus creates perverse incentives and invites collusive arrangements and tangible unfairness.

As noted above, the question presented arises with great frequency throughout the country. The MCS-90 is attached to insurance policies on millions of vehicles that travel throughout the United States. In 1999 alone, the Department of Transportation received reports of approximately 421,000 accidents involving vehicles subject to the MCS-90. Accordingly, this issue arises constantly, and the present division of authority creates real uncertainty for insurers and motor carriers. In short, this petition raises an important question that has divided the courts, that will recur frequently, and that has significant practical effects throughout the country. The Court should therefore grant certiorari to review the opinion of the Ninth Circuit.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE MCS-90 CONFLICTS WITH ITS TEXT AND PURPOSE, AND WITH THE STATUTE AND REGULATIONS THAT IT IS DESIGNED TO ENFORCE.

The Ninth Circuit held that the MCS-90 alters the terms of insurance policies to which it applies, requiring an insurer of a motor carrier to pay judgments against permissive users of its vehicles, even in the absence of any judgment against the insured motor carrier. This overbroad interpretation of the MCS-90 conflicts with its plain language, and with the statute and regulations that gave rise to it. To explain this conflict, and also to make clear the extent of the division between the Ninth Circuit and other courts that have interpreted the MCS-90, we briefly describe the broader framework for regulating the insurance of motor carriers.

1. Federal law has created a simple system to ensure that members of the public receive compensation for injuries sustained in accidents involving interstate motor carriers. Since the enactment of the Interstate Commerce Act ("ICA") in 1935, federal law has required certain interstate motor carriers to file a bond or proof of insurance to ensure adequate coverage for injuries to members of the public. Though they have applied to different categories of motor carriers, these laws -- and the regulations promulgated to enforce them -- have always spoken with perfect clarity about the scope and purpose of the required insurance. Simply stated, covered motor carriers must maintain sufficient funds or insurance to pay judgments entered *against themselves* for injuries to the public caused by negligence in the operation or maintenance of motor vehicles.

For example, the ICA provided that a motor carrier could not obtain a certificate or permit without posting proof of insurance "conditioned to pay . . . any final judgment *recovered against such motor carrier*." 49 U.S.C. § 315 (1976) (emphasis added). The regulations promulgated by the Interstate Commerce Commission under the ICA reflected exactly the same purpose, providing that no common carrier could receive an operating certificate without filing a bond or other proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier* for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation. . . ." 49 C.F.R. § 1043.1 (1996) (emphasis added). Similarly, the Motor Carrier Act of 1980 ("MCA") required a motor carrier to file a security "sufficient to pay . . . for each final judgment *against the carrier* for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance or use of motor vehicles." 49 U.S.C. § 10927 (1994) (emphasis added).

The ICC Termination Act, which replaced the MCA in

1996 and now governs interstate motor carriers, does not deviate from this longstanding approach. *See* 49 U.S.C. § 13906(a)(1) (requiring registrants to file a security "sufficient to pay . . . for each final judgment *against the registrant*") (emphasis added). Likewise, the regulations implementing the Act prohibit motor carriers from operating without proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier*." 49 C.F.R. § 387.301(a)(1) (emphasis added).

In short, the MCS-90 and its predecessor, the form BMC-90 endorsement, were designed to ensure that insurance policies obtained by motor carriers are in fact sufficient to pay judgments entered against them, up to the amount required by statute or regulation. As the Ninth Circuit observed, the MCS-90 protects the public by ensuring that registered motor carriers have the means to pay all judgments entered against them. It also ensures that exclusions in particular insurance policies do not operate to the detriment of the injured public. Thus, if an insurer ordinarily would not have to pay a judgment because it arose from a vehicle that was not covered by the policy, the MCS-90 would protect the public by requiring the insurer to pay the judgment. However, the MCS-90 makes clear that, in such cases, the insured motor carrier must reimburse the insurer.

The ICA, the MCA, and the ICC Termination Act of 1995, and the regulations promulgated thereunder, all envision a simple system. To obtain operating permits and licenses, regulated motor carriers must prove that they have the means to pay judgments entered against them on account of public injury. The MCS-90 attached to the relevant policies ensures that the insurer will pay *all* judgments entered against the insured motor carrier, regardless of any limitations contained in the policy. Moreover, under the overall statutory scheme, a motor carrier is liable for more than its own negligence. *See Integral Ins. Co. v. Lawrence Fulbright*

Trucking, Inc., 930 F.2d 258, 261 (2d Cir. 1991) ("The language of both the statute and the implementing endorsement thus reflect an intention to furnish indemnification even where the insured carrier is adjudged only vicariously liable for the negligence of another."). Thus, though the MCS-90 requires an insurer to pay only judgments against its insured motor carrier, it provides substantial protection for the public. As forms of vicarious and strict liability are available under state and federal law, injured members of the public can obtain judgments against motor carriers for the conduct of employees and others entrusted with vehicles. When they do so, the MCS-90 makes clear that insurers must pay those judgments, and may then obtain reimbursement from insured motor carriers for any payments that were not required by the policy. But the statue, regulations, and MCS-90 all make clear that entry of judgment *against the insured motor carrier* is the event that triggers the insurer's obligation to pay.

2. The Ninth Circuit's interpretation of the MCS-90 confuses this simple scheme and expands the insurers' liability beyond the scope contemplated by the Act and its implementing regulations. Though the Act explicitly requires insurance for "judgments against the registrant," 49 U.S.C. § 13906(a)(1), and the regulations require insurance "to pay any final judgment recovered against such motor carrier," 49 C.F.R. § 387.301(a)(1), the court strayed far from this plain language and vastly expanded insurers' obligations. Divorcing the MCS-90 from its statutory context, the Ninth Circuit read the MCS-90 as creating a whole new category of "insureds" under the Policy and then held that the MCS-90 requires the payment of any judgment on behalf of any of these newly minted "insureds."

The Ninth Circuit's convoluted interpretation of the MCS-90 conflicts not only with the background statutory scheme, but also with the text and structure of the MCS-90

itself.[3] Although the MCS-90 does not employ the phrase "named insured," its uses "insured" in a way that makes quite clear that that term refers to the insured motor carrier, and not any party entitled to coverage under the Policy. First, the MCS-90 begins by making clear that its effect is "to assure compliance by the insured, within the limits stated herein, *as a motor carrier of property*, with [the applicable law and regulations]." 49 C.F.R. § 387.15 (emphasis added). Thus, the "insured" to whom the MCS-90 refers is plainly a "motor carrier." Drivers and other hired employees who may receive coverage under motor carriers' policies are simply not "motor carriers." Accordingly, the MCS-90 necessarily uses "the insured" to refer to the motor carrier, and not to every party who may be covered under the base policy, let alone to other parties who fail even to qualify as "insureds" under that policy.

Second, the MCS-90 creates an agreement between the insurer and the motor carrier that it insures. The relevant portion begins with the statement that "[i]n consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay . . . any final judgment recovered against the insured for public liability." *Id.* Later, the MCS-90 repeatedly notes that certain facts are "understood" and agreed between the insurer and the insured. Of particular importance, the "insured agrees to reimburse the company for any payment made by the company on account of . . . any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained

[3] Indeed, in a decision that the Ninth Circuit affirmed by unpublished opinion, one district court interpreted the MCS-90's use of the term "insured" as referring only to the named insured: "The language of the endorsement, the relevant federal regulations, and the intent of the parties all indicate that the term 'insured' refers only to the named insured." *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999).

policy except for the agreement contained in this endorsement." *Id.*[4]

Such language makes clear that, consistent with the overall regulatory structure in which it operates, the MCS-90 simply expands the agreement, set forth in the underlying policy, between the insurer and insured. In consideration for the policy premium, the insurer agrees to pay any judgments for public liability against "the insured," even if the terms of the policy would exclude such payments. However, "the insured" agrees to reimburse the insurer for any payments that the policy would not have required. Because persons incidentally insured under the Policy were not parties to the insurance contract and did not pay any consideration or accept a corresponding obligation to reimburse the insurer, one must necessarily read the MCS-90's use of "the insured" to refer only to the motor carrier named in the Policy. Indeed, this reading finds further support in the fact that the MCS-90 makes consistent use of the definite article, speaking only of "the" insured. The omission of any reference to "an" insured confirms that the MCS-90 applies only to the named insured, and not to all parties entitled to coverage under a policy.

Third, if one reads the term "insured" as referring to any party entitled to coverage under the underlying policy, the MCS-90 becomes largely superfluous. By definition, if a party is an "insured" under a standard motor vehicle insurance party, then the insurer has a duty to defend and indemnify it. As a result, the MCS-90 serves no purpose with respect to such "insureds," whom the insurer must already in-

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[4] This reimbursement provision contravenes the fundamental rule of insurance coverage that an insurer may not subrogate against its own insured. This extreme divergence from standard practice makes clear that the MCS-90 is a departure from traditional notions of coverage, and offers strong evidence that, contrary to the view of the Ninth Circuit, the broad, omnibus definition of "insured" contained in the underlying policy has no place in the MCS-90.

demnify. In contrast, as discussed above, the motor carrier named in a standard policy is not always entitled under that policy to coverage for all accidents and judgments against it. It is therefore most sensible to read the MCS-90 as providing the public with protection in that category of cases.

If one examines the language in the MCS-90 in conjunction with the statute and regulations that it implements, it becomes clear that this is the proper interpretation. As already noted, the statute and regulations are absolutely clear in requiring regulated motor carriers to obtain insurance to cover judgments *against themselves*, not judgments against third parties. *See* 49 U.S.C. § 13906(a)(1) (motor carriers seeking to register must file a security "sufficient to pay . . . for each final judgment *against the registrant*")(emphasis added); 49 C.F.R. § 387.301(a)(1) (motor carriers may not operate without proof of insurance "conditioned to pay any final judgment recovered *against such motor carrier*")(emphasis added). As the MCS-90 was promulgated to effectuate this clear directive, there is simply no basis for interpreting it to create coverage broader than that which the underlying statute and regulations require. Thus, the term "insured" can only refer to the named insured, *i.e.*, the registering motor carrier whom the statute obliges to obtain insurance.

By failing to examine the MCS-90 in its proper context, the Ninth Circuit construed its language in a convoluted manner that imposes liability far beyond the contemplation of the statute. Because the Ninth Circuit's holding conflicts with language of all the relevant provisions and creates considerable uncertainty, this Court should grant review and restore the system required by statute.

II. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THE HOLDINGS OF SEVERAL COURTS OF APPEALS THAT AN INUSURER'S OBLIGATION UNDER THE MCS-90 IS TRIGGERED ONLY BY THE ENTRY OF A JUDGMENT AGAINST ITS INSURED MOTOR CARRIER.

For almost 50 years, federal courts of appeals were essentially unanimous in the view that an insurer's obligation under the MCS-90 (and its predecessor, the BMC-90) is triggered only by the entry of judgment against the motor carrier named in the insurance policy to which it is attached. The Ninth Circuit's decision in this case, and prior rulings by the Tenth Circuit, have destroyed this unanimity and created a conflict ripe for resolution by this Court.

1. As long ago as 1952, the Court of Appeals for the D.C. Circuit explicitly rejected the Ninth Circuit's rule and the logic that underlies it. In *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597 (D.C. Cir.), *cert. denied*, 344 U.S. 819 (1952), the court held that the then required "ICC endorsement," which was in all material respects identical to the MCS-90, did not modify the definition of "insured" in the underlying policy. The owner-operator of a trailer-truck had leased his vehicle to another motor carrier, for whom he operated the vehicle. As required by law, both the owner-operator and the lessee-carrier had insurance. The latter policy, which included an ICC endorsement, defined the "insured" as "the named insured and also . . . any person while using the an owned automobile or a hired automobile," but specifically excluded the owner of any "hired vehicle." After the victim of a highway accident obtained a judgment against the owner-operator, but not the motor carrier, the owner-operator's insurer brought an action against the motor carrier's insurer, claiming that the operator was an "insured" under its base policy.

The court rejected this claim, noting first that, under the terms of that policy, "if an injured party sues the named insured . . . and recovers, the insurance company will be liable; but if he brings suit solely against the owner of a hired vehicle . . ., the company assumes no responsibility either to the owner of the vehicle or to the injured party." *Id.* at 599. The court then concluded that the ICC endorsement did not change this basic result. After reviewing its operating language, and noting that the endorsement was designed to protect members of the public, the court observed that although "it doubtless would have enured to the benefit of [the victim], had she chosen to sue [the motor carrier]," the endorsement does not "shift the [owner-operator's] liability to [the motor carrier's] insurer" or "make [the owner-operator] an 'insured' under the [motor carrier's] policy." *Id.* at 600. In so doing, the court emphasized that the definition of an "insured" remains "governed by the express provisions of the body of the contract." *Id.*

The D.C. Circuit's *National Mutual* opinion established two essential points. First, an insurer could be required to make payment under the predecessor of the MCS-90 only upon the entry of judgment against its insured motor carrier. Thus, to obtain the benefit of the MCS-90, the injured party must obtain a judgment against the insured motor carrier. Second, the endorsement does not change the definition of "insured" under the contract. In the case below, the Ninth Circuit rejected both of these principles, which were essential to the *National Mutual* rule.

In *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), the court followed the D.C. Circuit's basic approach and reasoning. In direct conflict with the Ninth Circuit, the Eighth Circuit held that the liability of an insurer of an interstate motor carrier under the MCS-90 and the relevant regulations is triggered only by the entry of judgment against the insured motor carrier. In *Wellman*, the

motor carrier leased a vehicle from an owner-operator who was later involved in an accident that injured a member of the public. This accident occurred while the owner-operator was hauling a load for another company. The injured party did not sue the insured motor carrier. Instead, after obtaining a default judgment against the owner-operator, she brought an action to recover directly from the motor carrier's insurer. The court found that the motor carrier's policy did not cover the owner-operator because it contained a provision excluding coverage unless the covered vehicle was used "exclusively in the business of the named insured." *Id.* at 137.

The injured party argued that, in light of the I.C.C. endorsement and regulations, the court should construe this exclusion narrowly. The court rejected this position, observing that "the relevant I.C.C. regulation . . . contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier." *Id.* at 138. As a result, the court deemed it "unreasonable" to use the regulations and public policies of the ICA "as a gloss to the exclusionary provisions of the insurance policy." *Id.* at 138-39. The court felt that the parties could not have contemplated "such broad coverage" and that it could not make the "unwarranted assumption that [the parties] somehow intended the apparent and obvious meaning of the endorsement to be inoperative and to be controlled instead by an I.C.C. regulation which in no way relates to or binds insurance companies." *Id.* In short, though noting that the insurer would have been liable if the injured party had obtained a judgment against its insured motor carrier, the court refused to make the "unjustified and illogical leap" of holding that an insurer "should be bound to pay a judgment for others who are not mentioned in the I.C.C. insurance regulation . . . and who are specifically excluded by the language of the policy." *Id.*

Though the Eighth Circuit did not directly construe the language of the predecessor of the MCS-90, its understanding of the underlying statute and regulations conflicts directly with the approach of the Ninth Circuit. The Eighth Circuit succinctly summarized its basic rule: "Since there was no judgment against the [insured motor carrier], the regulations which . . . require insurance coverage for judgments against the carrier . . . may not be read into the insurance policy to impose liability upon the insurer of the motor carrier in contravention of the precise, express terms of the policy." *Id.* Yet the Ninth Circuit's reading of the MCS-90 has precisely this effect. In the absence of any judgment against its insured, and despite regulations that require insurance only for such judgments, John Deere is required to pay a judgment against parties unmentioned by the regulations and specifically excluded from the Policy.

The Fifth Circuit has also held that an injured party may recover from a motor carrier's insurer only upon entry of a judgment against the motor carrier. In *White v. Excalibur Insurance Co.*, 599 F.2d 50, 55 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979), a motor carrier leased trucks and hired drivers from an owner-operator. An employee of the owner-operator died in a crash caused by another employee, who had fallen asleep at the wheel. The mother of the deceased employee obtained a judgment against the surviving driver, and then sought to collect from the carrier's insurer. Citing 49 U.S.C. § 315, the predecessor of the statute that now requires motor carriers to file insurance with the Department of Transportation, the Fifth Circuit held that "in order for [the insurer] to be liable under the policy filed by [the motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party." *Id.* As a result, the court held that the plaintiff was "barred from recovering from [the insurer] due to her failure to secure a judgment against the insured motor carrier." *Id.* The Ninth Circuit's construction of the MCS-90 makes the motor carrier's insurer liable without the

entry of judgment against the motor carrier, and therefore conflicts with the Fifth Circuit's holding and its understanding of the statutory scheme.

The Third Circuit has joined the majority of the courts by indicating that federal law governing motor carriers, including the predecessor to the MCS-90, does not require an insurer to pay judgments entered against parties other than its own insured. In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 139 (3d Cir. 1979), an interstate motor carrier leased a tractor-trailer from its owner, and employed a driver of its own. Both the motor carrier and the owner had insurance policies, with the former including the BMC-90 endorsement. After an accident involving the trailer, the injured parties brought a personal injury action in state court against the owner, the motor carrier, and their respective insurers. The owner and his insurance company then brought a federal action seeking a declaratory judgment that the BMC-90 and the accompanying federal regulations made the motor carrier's insurance the "primary" policy.

The Third Circuit rejected this view, holding that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duties to defend claims . . . *or to pay judgments entered against others*." *Id.* (emphasis added). In reaching this conclusion, the court focused on the fact that the governing statute and regulation "require only that the carrier give security 'to *Pay* any final judgment recovered *against such motor carrier*.'" *Id.* (emphasis in original). The court also noted that these authorities say "nothing about payment of judgments recovered against other parties." *Id.*

Although the Third Circuit addressed these issues in the context of a lawsuit between insurers, its holding and logic stand in direct conflict with the Ninth Circuit's approach. As the Third Circuit emphatically made clear, nothing in the ap-

plicable law, regulations, or the ICC endorsement requires a motor carrier's insurer to pay a judgment against anyone other than its own insured. This view is flatly inconsistent with the approach of the Ninth Circuit's holding that the MCS-90 both expands the policy definition of insured and requires an insurer to pay without the entry of judgment against its named insured.

2. For reasons already discussed, the decisions of the Third, Fifth, Eighth, and D.C. Circuit's conflict with the decision of the Ninth Circuit in this case. Those decisions also conflict with a decision of the Tenth Circuit, which stands alone in sharing the Ninth Circuit's expansive view of the language and effects of the MCS-90. In *Adams v. Royal Indemnity Co.*, 99 F.3d 964, 970 (10th Cir. 1996), the court held that the MCS-90 "indirectly modifies 'insured' as defined in the basic policies." There, an injured party had obtained a default judgment against the permissive user of a vehicle that was owned by an insured motor carrier, but was not listed in the motor carrier's policy. Although the injured party had not obtained a judgment against the insured motor carrier, and although the court found that the driver was not an "insured" under the terms of the motor carrier's policy, the court held that the injured party could nevertheless recover directly from the insurer, on the theory that the MCS-90 had enlarged the policy's definition of an "insured." Like the opinion of the Ninth Circuit below, *Adams* fundamentally misunderstands the operation of the MCS-90 and the protection it affords. In doing so, it rejects the logic of at least four courts of appeals and contributes to a profound conflict that requires this Court's resolution.

3. The decisions described above reveal that the courts of appeals have fundamental differences in their understanding of the system of insuring federally regulated motor carriers. Review of this case would afford the Court with the opportunity to provide needed guidance and to resolve the con-

troversy over the meaning and effect of the MCS-90.

III. THE ISSUE PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING.

The Ninth Circuit's ruling is fundamentally unfair both to insurance companies and to the motor carriers that they insure. Under the Ninth Circuit's reading of the MCS-90, a party injured in an accident with a vehicle covered by that endorsement may recover from the insurer without obtaining a judgment against its insured motor carrier. This rule may lead injured parties to seek default judgments against or settlements with the drivers of covered vehicles, without suing the motor carrier or the insurer. Knowing that insurance companies will have to pay such settlements and judgments, drivers will have little incentive to contest the merits of the underlying lawsuits. Unlike motor carriers, who will wish to avoid the MCS-90's reimbursement requirement, drivers face no liability or obligations to insurers, and thus will frequently choose simply to settle cases or accept default judgments. Insurers will have no contractual right to force them to do otherwise.

As a result, the Ninth Circuit's rule creates a series of perverse incentives that will expose insurers to liability without giving them the right or opportunity to defend the underlying claims. This rule will also have adverse effects upon motor carriers, for it is undisputed that the MCS-90 requires them, as the "insureds" under the policies, to reimburse their insurers for any payments that would not have been necessary in the absence of the MCS-90. Thus, motor carriers, like insurers, may be required to bear the costs of judgments that they were unable to contest. In short, the Ninth Circuit's approach invites collusion between drivers and parties injured in collisions with them, and seems certain to lead to manifest unfairness.

One brief example may illustrate the problems that the Ninth Circuit's rule will likely engender. As its text makes clear, the MCS-90 requires payment only of judgments for injuries caused by negligence in the operation or maintenance of motor vehicles. Thus, a party injured by the intentional tort of a driver may file a complaint alleging negligent injury and obtain a default judgment on that ground. Neither the motor carrier that employed the driver nor its insurer will have had the right to contest the finding of negligence. Yet when that injured party seeks to collect from the insurer under the Ninth Circuit's interpretation of the MCS-90, the insurer will be obliged to pay, without having a day in court. And the insurer's payment may in turn require the insured motor carrier to reimburse it.

The Ninth Circuit's misreading of the MCS-90 creates an additional unfairness that stands the regulatory scheme on its head. As discussed above, properly construed, the MCS-90 does not require insurers of motor carriers to assume the ultimate costs of judgments that were not covered by the terms of their policies. Though an insurer must make an initial payment, it is entitled to reimbursement of such payments from its insured motor carrier. But the Ninth Circuit's approach requires insurers to pay judgments entered against third parties (like drivers) who may not be subject to the MCS-90's reimbursement requirement. Because drivers and other employees are not parties to the underlying insurance policies, insurers may not be able to obtain reimbursement for payments made on their behalf under the MCS-90. Without any warrant in the text of the Act, the regulations, or the MCS-90, the Ninth Circuit has vastly expanded the liability of insurers.

Such problems are likely to occur with increasing frequency around the country. As noted above, no less than 150,000 MCS-90 endorsements are filed each year, and they apply to insurance policies that cover as many as 6 million

vehicles. In 1999, there were approximately 421,000 accidents involving vehicles covered by the MCS-90. The case law reflects the fact that the MCS-90 plays a frequent role in litigation concerning trucking accidents. A search of the federal and state cases in the Westlaw database reveals dozens of appellate and trial court opinions involving the MCS-90 in the last several years. In light of these numbers, it is quite clear that the issue presented in this case will recur time and time again.

Given the interstate movement of the covered vehicles and the nationwide reach of the insurance companies and their policies, two things are certain. First, the essential conflict between the courts of appeals will only intensify. Second, until this Court resolves the conflict, insurers and motor carriers will face the basic unfairness described above, and will also have to deal with tremendous uncertainty. Since they can never predict where vehicles owned by covered carriers will have accidents, insurers will have no way accurately to assess their likely liabilities. To remove the uncertainty generated by the existing divergence of authority, the Court should grant certiorari and lay down a uniform rule.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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